**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **SHARON BOSSE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **BENEDICTINE COLLEGE** | ) | |
| Respondent | ) | Docket No. **1,051,537** |
| | ) | |
| AND | ) | |
| | ) | |
| **ACCIDENT FUND NAT'L INSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier (respondent) request review of the December 6, 2013, Award by Administrative Law Judge (ALJ) William Belden. The Board heard oral argument on March 11, 2014.

### APPEARANCES

Jeffrey Cooper of Topeka, Kansas, appeared for claimant. Douglas Hobbs of Wichita, Kansas, appeared for respondent.

### RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

### ISSUES

Claimant sustained a compensable personal injury by accident on May 17, 2010. She claimed she sustained both physical and psychological injuries in that accident.

The ALJ found claimant sustained a 27.5% whole body functional impairment, based in part on a psychological injury, and that claimant had a 71% work disability, based upon a 100% wage loss and a 42% task loss.

Respondent contends the ALJ erred in determining the nature and extent of claimant's disability. Specifically, respondent argues claimant proved only a 17% permanent functional impairment to the right forearm and therefore work disability benefits should not be awarded. In the alternative, respondent maintains claimant sustained a 50% work disability based upon a 100% wage loss and no task loss.

Claimant contends her work disability should be increased. Claimant argues she proved a 76% task loss based upon Dr. Murati's opinions and a 100% wage loss, resulting in a work disability of 88%. In the alternative, claimant contends that averaging the task loss opinions of Drs. Murati and Toby results in a 40.5% task loss which, when averaged with a 100% wage loss, results in a 70.25% work disability.

The issue for Board determination is:

What is the nature and extent of claimant's disability, including:

1. Did claimant suffer a scheduled injury to her right forearm or an injury to the body as a whole?

2. Did claimant sustain a permanent psychological impairment as a consequence of her workplace injury on May 17, 2010?

3. To what extent, if any, is claimant entitled to work disability benefits in excess of her functional impairment?

## FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant performed housekeeping and custodial duties for respondent. On May 17, 2010, claimant was directed to clean a ceiling fan. Her supervisor told her to get a chair to stand on. Claimant fell off the chair and struck a desk, fracturing her right arm and right thumb. Claimant was taken by her supervisor to the emergency room of Atchison Hospital, where it was determined she fractured her right distal radius. The fracture was treated surgically by Dr. Corey Trease on May 24, 2010. The procedure consisted of open reduction and internal fixation by installation of a volar plate and screws. Dr. Trease released claimant in October 2010. Claimant also sought treatment from her family physician, Dr. Larry Campbell.

Claimant's employment with respondent was terminated on June 18 or 19, 2010.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, evaluated claimant on September 14, 2010, at the request of her counsel. The doctor reviewed

medical records, took a history and performed a physical examination. Dr. Murati diagnosed status post open reduction and internal fixation of the right wrist fracture and contusional right carpal tunnel syndrome. In Dr. Murati's opinion, these diagnoses were direct results of claimant's work-related accident of May 17, 2010. The doctor recommended a consultation with a hand surgeon.

Claimant received treatment from Dr. Bruce Toby at the University of Kansas Medical Center. Dr. Toby, an orthopedic surgeon who specializes in upper extremities, evaluated claimant initially on December 22, 2010, at the request of respondent. X-rays revealed claimant's right distal radius fracture had healed. Claimant complained of problems with her right thumb and x-rays showed a lesion in the bone, possibly a benign tumor. X-rays also revealed a probable fracture of the distal phalanx of the right thumb. Dr. Toby found claimant had pain and mild loss of range of motion of the right thumb. The doctor ordered electrodiagnostic studies of the right upper extremity to determine if there was objective evidence of neurological involvement.

On January 19, 2011, claimant returned to see Dr. Toby to review the results of the electrodiagnostic studies and discuss her treatment options. The electrodiagnostic studies revealed claimant had moderate right carpal tunnel syndrome.

Dr. Toby performed right wrist and right thumb surgery on February 8, 2011. The procedures consisted of neurolysis of the median nerve in the right distal forearm through the carpal canal; release of the transverse carpal ligament; and removal of the volar fixation plate in the right distal radius. Dr. Toby examined the distal phalanx fracture with fluoroscopy. A biopsy of the lesion showed no evidence of malignancy.

On February 23, 2011, claimant returned for a follow-up visit and was seen by Dr. Toby's physician assistant. It was recommended that claimant wear a removable wrist splint for two weeks and return to modified duty as of March 3, 2011.

Claimant again saw Dr. Toby on April 8, 2011. Claimant had discomfort over the surgical incision and numbness over the dorsal side of the incision. Dr. Toby released claimant to full-duty work and scheduled her to return in two months for a final assessment. Claimant did not return for the final assessment. However, Dr. Toby did have another office visit with claimant on January 9, 2013, at respondent's request.

On January 9, 2013, Dr. Toby opined claimant had reached maximum medical improvement and released her from treatment with no permanent restrictions. Based upon the AMA *Guides,*[1] Dr. Toby found claimant sustained a 17% permanent partial impairment to her right upper extremity. The doctor reviewed the list of claimant's former work tasks

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

prepared by vocational consultant Richard Thomas and concluded claimant could no longer perform 4 of the 38[2] tasks for a 10.5% task loss.[3]

Dr. Toby testified:

> Q. Did you find any anatomical reason for her to have the numbness in her hand as well as the other complaints?
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> A. I did not have any anatomical reason for her to have some of her complaints, although certainly her fracture would be something that would cause limited motion of her wrist, which she demonstrated.
>
> Q. As far as the nerve problems that she complained of in the median and ulnar distribution, did you have any explanation for those problems?
>
> A. No.[4]

Claimant admitted having psychological treatment for depression and anxiety in 1991 and 2003. She testified she and her children witnessed her fiancé commit suicide in 1991. Claimant received psychological counseling for about six months after that incident and was prescribed Zoloft. According to claimant she was prescribed Lexapro and Klonopin in 2003 due to physical and emotional abuse by her ex-husband. Claimant testified she used the same medications continuously from 2003 until her accidental injury in 2010. Claimant attended one session of marriage counseling in 1995. In 2005, claimant was taken by ambulance to Atchison Hospital for what she called an "[a]nxiety attack."[5]

According to claimant, after her work injury, her dosages of Lexapro and Klonopin were "doubled"[6] and she was prescribed a third medicine, Ambien, to help her sleep. The records of Dr. Campbell and the Atchison Clinic, stipulated into evidence by the parties on February 20, 2013, indicate claimant's Lexapro dosage was the same before and after the 2010 injury: 20 mg once daily. The same records corroborate claimant's testimony that she received the sleeping medication Ambien after her injury, and that her dosage of Klonopin increased from 1 mg twice daily before the injury to 2 mg twice daily after the injury. According to Dr. Robert Barnett, a psychologist retained by claimant, the increased dosage of Klonopin, which he described as a "large dose," could result from claimant becoming

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[2] The deposition of Mr. Thomas indicated 39 tasks.

[3] Toby Depo. at 17, 19-22, 26-28.

[4] *Id.* at 16.

[5] Cl. Disc. Depo. at 16-17.

[6] R.H. Trans. at 22.

"habituated" to that medication and she had to take more to achieve the same effect.[7] Claimant testified she still has symptoms of depression and anxiety because she is not working. Claimant testified those symptoms have worsened since the injury.

The stipulated medical records referred to previously show that claimant's problems with depression and anxiety were likely chronic and that she was taking Lexapro and Klonopin well before 2003:

1. In 1998, claimant was seen at Dr. Campbell's office with complaints of depression and stress.

2. In 2000, claimant was seen at Dr. Campbell's office with complaints of depression, being very upset and having problems with her husband. Claimant was prescribed Zoloft, an antidepressant, starting with 25 mg and increasing to 50 mg after one week.

3. Claimant was seen at the Atchison Clinic on March 16, June 19, and September 21, 2007. Claimant complained of anxiety and depression and was taking Lexapro and Klonopin on all three visits.

4. Claimant was seen in the Atchison Clinic on November 12, 2008, with complaints of anxiety and depression. Claimant was provided with samples of Lexapro and was already taking Klonopin, 1 mg once daily.

5. Claimant was seen at the Atchison Clinic on June 24, 2009, with complaints of anxiety and depression. She was taking Lexapro, 20 mg once daily, and Klonopin, which was increased to 1 mg twice daily.

6. Claimant was seen at the Atchison Clinic on April 5, 2010, approximately 6 weeks before the accident, with complaints that included anxiety. The chart entry for that date indicated claimant was taking Lexapro, 20 mg daily.

7. The increase of claimant's dosage of Klonopin and the initial prescription of Ambien occurred at a visit to Dr. Campbell's office on September 25, 2012, over two years after claimant's accidental injury.

Dr. Robert Barnett, a licensed clinical psychologist and rehabilitation counselor/ evaluator, performed a psychological evaluation on June 13, 2011, at the request of claimant's counsel. The only records Dr. Barnett reviewed were the records of Dr. Caffrey.[8]

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[7] Barnett Depo. at 34.

[8] *Id.* at 12.

The doctor diagnosed moderate to severe adjustment disorder with mixed features (depression and anxiety). Dr. Barnett recommended a consultation with a psychiatrist for medication management and counseling with a licensed clinical psychologist. The doctor opined claimant's diagnosis was causally related to her physical injury sustained on May 17, 2010. Dr. Barnett opined claimant did not have any pronounced cognitive difficulties that would interfere with employment.

In Dr. Barnett's opinion:

> [Claimant's] descriptions of symptoms that have arisen since her injury in 2010, are consistent with my observations of her during the interview. The symptoms that she lists are consistent with a diagnosis of adjustment disorder with mixed features (anxiety and depression). The adjustment disorder diagnosis is normally assigned when symptoms arise following a specific event. If the symptoms do not resolve within a two-year period, the diagnosis is amended to dsythymic disorder, late onset. In my clinical opinion, the symptoms Ms. Bosse describes are consistent with difficulties with both depression and anxiety, and appear directly related to the injury.[9]

Dr. Patrick Caffrey, a licensed clinical psychologist, evaluated claimant on October 27, 2011, at respondent's request. Thereafter, he provided authorized psychological treatment pursuant to an order entered by the ALJ. The doctor initially reviewed medical records, conducted psychological testing and performed a structured diagnostic interview. Dr. Caffrey testified:

> Q. And I asked you in a letter to address whether you felt that the claimant's psychological problems were directly traceable to the claimant's physical injuries, and did you provide an opinion within a reasonable degree of psychological probably [sic] to that question?
>
> A. Yes.
>
> Q. What was that?
>
> A. I did believe that the industrial injury dated May 17th, 2010 was, in fact, traceable to the psychological problems she presented.[10]

In Dr. Caffrey's opinion, claimant did not suffer any permanent psychological impairment due to her workplace injury. The doctor further opined claimant had no permanent restrictions from an emotional or psychological standpoint. According to Dr. Caffrey:

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[9] *Id.*, Ex. 2 at 13.

[10] Caffrey Depo. at 14.

> Q. If Ms. Bosse is continuing to take psychotropic antidepressive drugs now and these are the same drugs that she was on prior to the injury, do you have an opinion as to whether the need for those antidepressives and psychotropic drugs is related to the 5/17/2010 injury or related to her premorbid problems?
>
> A. Well, I think that we might say premorbid problems or even baseline, in other words, she is back at baseline, so to the extent she was taking those medications before and if she continued to take them I think that would allow her to function adequately like she had been.[11]

Dr. Caffrey testified claimant had chronic pain and anger associated with her accidental injury:

> Despite the mixed findings, it appears she does have anxiety to such an extent that I would provide a diagnosis of 300.02 Generalized Anxiety Disorder. She also appears to have Pain Disorder Associated with Both Psychological Factors and a General Medical Condition. The industrial injury is the prevailing factor for the depression and anxiety diagnoses. She could benefit for [sic] treatment and these treatment needs arise directly from the industrial injury.[12]

Dr. Caffrey last saw claimant on March 30, 2012, at which time claimant was "doing pretty good."[13] Claimant canceled appointments she scheduled with Dr. Caffrey on May 18 and 25, 2012.

Dr. Caffrey opined: "In the opinion of this examiner, I believe that the claimant's psychological problems are directly traceable to the May 17, 2010 industrial injury. It should be pointed out, however, that Sharon has, in some ways, made the situation worse because of an attitude of anger and entitlement."[14]

Dr. Barnett reevaluated claimant at the request of her counsel on July 9, 2012. The doctor performed another psychological interview and opined claimant's condition had deteriorated since his first evaluation. He changed his diagnosis to late onset, moderate to severe dysthymic disorder and anxiety disorder. Based on the fourth and second edition of the AMA *Guides*, Dr. Barnett testified claimant sustained a 35% whole body permanent psychological impairment.

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[11] *Id.* at 26-27.

[12] *Id.*, Ex. 2 at 14.

[13] *Id.* at 41.

[14] *Id.*, Ex. 2 at 16.

Dr. Barnett testified as follows:

> Q. Okay. If she's having the same symptoms and under the same medication before 2010 that she's having after 2010, again, how can you determine what symptoms and what injuries and what psychological problems are directly traceable to the 2010 injury and what's preexisting?
>
> A. Okay, there's [sic] two issues here. Your premise is that they're the same before the injury as they were after and I don't believe they are. I think they were worse after the injury and it's my clinical opinion that what she described in the interviews with me following the injury were worse and in some cases there were some things that I think were, were, she described as being new symptoms after her injury.
>
> Q. And how was it worse?
>
> A. Well, I asked her, I said are these things, you know, are these worse than they were before and she said yes, they're much worse.[15]

Dr. Barnett's clinical judgment was based on claimant's subjective statements. He testified claimant had a 35% psychological impairment due to her work-related injury. He opined that claimant could possibly improve if she received additional treatment. In Dr. Barnett's opinion, claimant's injury exacerbated and aggravated her psychological condition.[16]

On August 14, 2012, claimant was reevaluated by Dr. Murati at her attorney's request. The doctor reviewed additional medical records, took a history and performed another physical examination. Dr. Murati imposed restrictions of no lifting with the right upper extremity greater than 35 pounds on an occasional basis and 20 pounds frequently.

Dr. Murati opined claimant had moderate right carpal tunnel syndrome, which resulted, under the AMA *Guides*, in a 20% permanent functional impairment to the right upper extremity. Due to crepitus in the right wrist, claimant sustained an additional 6% impairment to the upper extremity. Using the Combined Values Chart in the AMA Guides, claimant's right upper extremity impairments combine for a 25% to the right upper extremity.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Richard Thomas and concluded claimant could no longer perform 28 of the 38[17] tasks for a 73.7% task loss.

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[15] Barnett Depo. at 38-39.

[16] *Id.* at 56.

[17] See Footnote #3.

Richard Thomas interviewed claimant on October 16, 2012, at the request of her counsel. Mr. Thomas developed a task list of 38 non-duplicated tasks claimant performed in the 15 years before her accidental injury.

After leaving respondent's employ, claimant worked for another employer for three days but she testified she could not lift anything due to her right arm symptoms. Claimant applied for social security disability benefits. Claimant fractured her left wrist in a non-work related event on January 11, 2012. That injury required surgical treatment with plating.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.[18] The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[19]

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[20] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[21]

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[18] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[19] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[20] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[21] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Psychological disorders can be compensable if they are directly traceable to a claimant's physical injury.[22] The standard for whether a psychological injury, or traumatic neurosis, is compensable under the Workers Compensation Act is that the psychological injury must be directly traceable to a compensable physical injury.[23]

The Board affirms the ALJ's decision in all respects. The findings of fact set forth in the award are supported by a preponderance of the credible evidence and are adopted by the Board, as supplemented by the above findings. The ALJ's findings are incorporated into this Order as though fully set forth.

Under the circumstances of this claim, the Board agrees with the ALJ's conclusions regarding claimant's permanent functional impairment of 27.5% to the whole body and claimant's task loss of 42%. Those conclusions, as Judge Belden explained, provide equal weight to the opinions of Drs. Toby, Caffrey, Murati and Barnett.

There is no dispute claimant's wage loss is 100% which, when averaged together with a 42% task loss, results in a work disability of 71%.

The testimony of claimant and Drs. Caffrey and Barnett support the conclusion that claimant's psychological issues with anxiety and depression were directly traceable to claimant's physical injuries she sustained on May 17, 2010. Dr. Barnett was not provided with any medical records and he only reviewed the psychological records of Dr. Caffrey, which reduces the weight to be accorded his causation opinions. However, respondent's retained psychological expert, Dr. Caffrey, testified claimant's post-injury psychological problems were directly traceable to claimant's injuries. Moreover, claimant's dosage of Klonopin was increased after the injury and claimant was prescribed a new medicine, Ambien, to help her sleep. Also, claimant testified her symptoms of anxiety and depression have worsened since her injury.

Dr. Caffrey's opinion that claimant has returned to her pre-injury "baseline" is not supported by the other evidence in the record.

Respondent argues, relying on Bergstrom,[24] that psychological injuries are not compensable because the Act does not explicitly refer to such injuries. This issue was not raised before the ALJ and it accordingly will not be addressed by the Board.

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[22] *Adamson v. Davis Moore Datsun, Inc.,* 19 Kan. App. 2d 301, 868 P.2d 546 (1994)*; Love v. McDonald's Restaurant,* 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

[23] *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

[24] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

The ALJ committed no error in his findings and conclusions concerning the nature and extent of claimant's disability. The Award is affirmed in all respects.

## CONCLUSIONS OF LAW

1. Claimant sustained a whole body disability, not only a scheduled injury to the right forearm.

2. Claimant's permanent functional impairment is 27.5% to the whole body.

3. Claimant's task loss is 42% which, when averaged with claimant's 100% wage loss, results in a work disability of 71%.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[25] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE**, it is the Board's decision that the Award of ALJ William Belden dated December 6, 2013, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this _____ day of July, 2014.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[25] K.S.A. 2009 Supp. 44-555c(k).

## DISSENT

The undersigned Board Member dissents from the finding of the majority that respondent proved she had a whole person functional impairment. This Board Member would find claimant failed to prove she sustained a permanent psychological impairment. Claimant was evaluated by Drs. Barnett and Caffrey. The ALJ concluded the opinions of both psychologists were flawed, but then split the functional impairment ratings of the two psychologists and found claimant sustained a permanent psychological impairment.

Dr. Barnett did not have claimant's complete psychological history. He only had the records of Dr. Caffrey, that dated back to December 16, 2011, despite the fact claimant's psychological issues began in 1991, when she observed her fiancé commit suicide. Claimant took several medications continuously for her psychological condition since 2003. As pointed out by the majority, Dr. Barnett's opinion that claimant's psychological condition was worsened by her 2010 accident, was based upon claimant's subjective statements that things were worse after her accident. Dr. Barnett testified:

> Q. All right. So in all fairness to you, you don't have a clear history of what her medical history was other than through her own statements?
>
> A. That is correct.[26]

Dr. Caffrey's opinion should not be considered, as he did not consult the *Guides* when rendering his opinion. In *Cobb,*[27] the Board discounted the opinion of a physician because he testified Cobb's injury was so minor, it was unnecessary to consult the *Guides* to determine Cobb had no permanent functional impairment. The Kansas Court of Appeals indicated it would not re-weigh the evidence and affirmed the Board, stating:

> The Board is permitted to make credibility determinations based on the doctor's inclusion or exclusion of the AMA *Guides* in his or her analysis in arriving at an impairment rating. See *Ricks v. Catholic Care Center*, No. 95,979, 2007 WL 220108, at (Kan.App.2007) (unpublished opinion) (there is an objective basis for evaluating the doctor's credibility when the impairment opinion is based on the doctor's inclusion or exclusion of the AMA Guides in his analysis); *DuBoise v. Hallmark Cards, Inc*., No. 94,949, 2006 WL 995746, at (Kan.App. 2006) (unpublished opinion), rev. denied 282 Kan. 788 (2006) (Board's decision that one doctor's testimony was more credible than another doctor's testimony because he examined the claimant on several occasions and conducted physical and neurological tests and "based his impairment rating on the AMA Guides as

[26] Barnett Depo. at 25-26.

[27] *Cobb v. Fab-Pro Orineted Polymers,* No. 109,010 (Kansas Court of Appeals unpublished opinion filed Nov. 27, 2013).

> statutorily mandated"); *Cerritos v. Tyson Fresh Meats*, No. 93,177, 2005 WL 1089708, at (Kan.App.2005) (unpublished opinion), rev. denied 280 Kan. 981 (2005) (substantial competent evidence supported the Board's denial when the doctor acknowledged that had he used the AMA *Guides*, 4th edition, the claimant's impairment would have been zero).

The burden of proof is upon claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence.[28] This Board Member would find claimant failed to prove by a preponderance of the evidence she sustained a permanent psychological impairment. The ALJ and the majority averaged the functional impairment ratings of two flawed opinions. Logic dictates that if the opinions of Drs. Barnett and Caffrey are flawed, then averaging their opinions results in a flawed functional impairment rating.

_____
THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable William Belden, ALJ

[28] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).